

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

GEORGE A. JACKSON, et al.,)	
)	
Plaintiffs,)	
)	
v.)	C. A. No. 05-823-***
)	
STANLEY TAYLOR, et al.,)	JURY TRIAL REQUESTED
)	
Defendants.)	

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO AMEND THE ANSWER

Pursuant to Fed. R. Civ. P. 15, Defendants hereby move to amend the Answer [D.I. 135] to the Amended Complaint [D.I. 114] to assert the affirmative defense of failure to exhaust administrative remedies under the Prisoner Litigation Reform Act. In further support of this Motion, Defendants state as follows:

1. Plaintiffs George Jackson, Charles Blizzard and Darus Young¹ (“Plaintiffs”) have opposed Defendants’ Motion to Amend on several grounds. First, they argue that the Motion is being made in “bad faith.”

2. Federal Rule of Civil Procedure 15 states that leave to amend “shall be freely given when justice so requires.” While the decision of whether to grant or deny a motion to amend is within the discretion of the District Court, the phrase “freely given” shall be accorded full effect. *Foman v Davis*, 371 U.S. 178, 182. Rule 15 should be liberally construed to ensure that all issues are presented to the court. *U.S. for Use and Ben. of B&R, Inc. v. Donald Lane Construction*, 19 F. Supp. 2d 217, 221 (D. Del. 1998).

¹ Because only these three Plaintiffs signed the Response to Defendants’ Motion to Amend, the Motion is unopposed as to the remaining Plaintiffs.

3. A motion to amend may be denied when it is made in bad faith. However, this Court has interpreted “bad faith” to mean “actual or constructive fraud; a design to mislead or deceive; or a neglect or refusal to fulfill some duty or contractual obligation not prompted by an honest mistake but rather by some interested or sinister motive.” *Id.* at 221 n.6.

4. In this case, there is no “interested or sinister motive” behind the Motion to Amend. Rather, the record as developed shows a factual dispute as to whether the PLRA’s exhaustion requirement was satisfied as to all the Plaintiffs. Thus, Plaintiffs’ argument that Defendants have acted in bad faith is without merit.

5. Plaintiffs also argue that the Motion to Amend would be futile. In support of this argument, Plaintiffs point to language from a grievance procedure indicating that inmates are prohibited from submitting more than one grievance arising from a single incident. Plaintiffs thus claim that Jackson’s grievance satisfies the exhaustion requirement for all the Plaintiffs.

6. However, the applicable grievance procedure also states that if more than one inmate files a grievance on the same incident, the grievances will be consolidated. *See* Excerpt from State of Delaware Bureau of Prisons Procedure 4.4 attached hereto as Exhibit A. Thus, the procedure *does* contemplate multiple grievances by inmates on the same issue. It is undisputed in this case that only Jackson signed and filed the July 19, 2005 grievance at issue. Thus, there remains a fact issue as to whether the exhaustion requirement has been satisfied by all of the Plaintiffs.

7. Plaintiffs further claim that because the alleged adverse conditions in the kitchen continue, their grievances would not be time-barred, and thus they could file

individual grievances now, if permitted by procedure. This case is not about conditions in the kitchen now. Rather, it is about conditions prior to and up until the filing of the Complaint. Thus, the ability of Plaintiffs to present grievances at this time is irrelevant.

8. Finally, Plaintiffs argue that they will be prejudiced by the proposed amendment because their responses to interrogatories were based on the fact that failure to exhaust was not asserted as a defense in the first Answer. There is no scheduling order in place in this case. Plaintiffs are free to supplement their discovery responses at any time. Thus, they can show no prejudice by granting of Defendants' Motion to Amend.

WHEREFORE, Defendants respectfully request that this Court grant their Motion to Amend the Answer to the Amended Complaint.

**STATE OF DELAWARE
DEPARTMENT OF JUSTICE**

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Date: August 7, 2007

CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2007, I electronically filed *Defendants' Reply in Support of Motion to Amend the Answer* with the Clerk of Court using CM/ECF. I hereby certify that on August 7, 2007, I have mailed by United States Postal Service, the document to the non-registered parties on the attached service list.

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